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TAN SRI KASITAH GADDAM v. KALIMIN SAHADI & ORS

HIGH COURT SABAH & SARAWAK; KOTA KINABALU
LIM HOCK LENG J
[CASE NO: BKI-22NCvC-75-10-2020]
26 JUNE 2024

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Abstract – *The court, in the determination of the validity of the transfer of land by the deceased vendor, would consider all the facts in relation to the case. In the instant case, the relevant factors to be considered by the court were, inter alia, whether the deceased had agreed to sell the land, existence of subject matter of the purported transaction, express prohibition against transfer in the title deed, limitation, and most importantly, the fact that the deceased was illiterate and could not have possibly executed the relevant documents. The purchaser's failure to lodge a caveat to protect his interest would also work to defeat his claim.*

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LAND LAW: *Transfer – Validity of – Challenge against transfer of land by deceased vendor – Whether execution of documents done by way of fraud – Whether non-use of word of 'forgery' in pleadings defeated claim – Whether deceased vendor illiterate and could not have signed documents – Whether signatures of deceased vendor questionable – Whether absence of evidence of any signatures of deceased vendor for comparative analysis consistent with assertion that deceased vendor was illiterate – Whether negated validity of transfer – Whether puchaser's earlier occupation of land determinative of purchase of land – Whether title deed contained express terms prohibiting transfer*

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LIMITATION: *Cause of action – Accrual of – Limitation period for specific performance of contract – Three years from date fixed for performance or upon notice of refusal of performance – Whether claim defeated by limitation*

The core issue in this case was whether the plaintiff had acquired a parcel of land, the subject matter in this dispute, from the original registered owner ('deceased') under a sale and purchase agreement, so as to defeat the defendants' re-amended counterclaim that the plaintiff had trespassed onto the land by reason of which they sought damages. The lease for the land had lapsed at the time the SPA was executed. The defendants herein were the children of the deceased. The plaintiff explained that the title deed remained with the deceased who bore the responsibility to renew the lease. The defendants applied for and obtained a distribution order ('perintah pembahagian tanah') from the Syariah Lower Court. The lease for the land was renewed by the Director of Lands and Surveys for a term of 99 years with effect from January 2012 and the perintah pembahagian tanah was endorsed on the title deed. In 2015, the plaintiff started proceedings in the Syariah High Court which, in due course, ordered the Syariah Lower Court

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to rehear the application for administration and distribution and for the dispute over the ownership of the land to be referred to a civil court. Hence, the plaintiff filed the action herein against the nine defendants. The plaintiff averred that he first paid the deceased RM30,000 as deposit and RM60,000 as part payment of the purchase price. PW2, the solicitor, subsequently, prepared the sale and purchase agreement ('SPA') dated 30 October 2002 and a power of attorney ('PA') on the same day. A memorandum of transfer ('MOT') of the land from the deceased to the plaintiff was then prepared. The plaintiff sought declarations that the SPA was binding on the defendants and an order for transfer of the land to the defendants be cancelled forthwith. On the other hand, the defendants' contention was that the subject matter of the purported transaction was non-existent since the lease of the land had lapsed and the land had reverted to the State. The defendants also highlighted the express term in the title deed prohibiting transfer and argued that limitation had set in so as to defeat the plaintiff's claim.

Held (dismissing plaintiff's claim and allowing defendants' counterclaim for trespass with nominal damages):

(1) While the word 'forgery' was not used in the re-amended defence and counterclaim, the defendants denied that the deceased had executed the SPA, PA and MOT and that the documents were not executed by the deceased, as he was illiterate. The defendants also pleaded that the alleged signatures of the deceased were questionable and/or not genuine. The defendants had pleaded in a negative manner that the deceased did not sign the impugned documents, instead of positively asserting that the signatures therein were forged. On the other hand, there was no evidence of any of the signatures of the deceased which could be used for comparative analysis by a document examiner. The absence of an expert report was consistent with the assertion that the deceased was illiterate. (paras 30, 32 & 33)

(2) The inconsistencies in the evidence regarding the purchase price and whether it was actually paid in full and what was the amount to be paid for the renewal of the lease cast doubts over whether the receipts, the SPA, PA and MOT were genuine and whether they had been signed by the deceased. The deceased never went to school and there was no evidence that he ever signed any documents. The first receipt was in Bahasa Malaysia and while the deceased may have understood Bahasa Malaysia, he certainly did not understand English, the language in which the second receipt and the SPA, PA and MOT was prepared. Therefore, it was more likely than not that the deceased did not sign the impugned documents. (paras 57-59 & 61)

(3) If at all the full purchase price had been paid, the MOT would have been executed at the same time as the SPA, on 30 October 2002. Instead, the MOT was only purportedly signed by the deceased on 29 January 2003, suggesting that full payment was made then. However, full payment could not have been made because the plaintiff, through his solicitors, had broached the topic of payment of balance purchase price on 14 February 2014. Further, although the plaintiff signed the caveat on 17 October 2011, it was only lodged some eight months later. Moreover, the purported PA gave the plaintiff the right to accept letters of offer and to sign for the draft title and issued title, and to pay the premium. If at all the deceased had signed the PA, there was no reason why the plaintiff did not invoke the PA to move along the renewal process. (paras 66, 67, 70 & 78)

(4) The plaintiff's earlier occupation of the land was not determinative of his claim that he had purchased the land. While the plaintiff had occupied and put the land to use ahead of the defendants at much expense, it was significant that he did not timeously lodge a caveat or take legal action against them when they wrested occupation on the land, such as applying for the necessary interim injunctive relief. Further, any transfer that is expressly prohibited and would be illegal, more so, when there is no evidence that there was any application to the Director of Lands and Surveys for transfer of the land. The title deed had an express term that transfer was prohibited. (paras 89, 101 & 105)

(5) Time started to run from 2012 when DW3 went to the land to try to wrest occupation of the land from the plaintiff and his workers, and the plaintiff lodged his first caveat on 29 June 2012 some ten years after the purported SPA. Alternatively, time started to run from 14 February 2014 when the plaintiff's solicitors wrote to the second defendant to discuss the payment of the purchase price, the handing over of the title deed and 'tindakan bersama untuk kebaikan semua pihak'. The limitation period for specific performance of a contract is three years from the date fixed for performance or, if no such date is fixed, when the plaintiff first had notice that performance was refused. The limitation period for a suit for which no limitation period, provided elsewhere in the Schedule to the Limitation Ordinance, is six years. In such instance, time starts to run when the right to sue accrues. On either view, the plaintiff's claim, which was filed on 1 October 2020, was defeated by the plea of limitation mounted by the defendants. (paras 106-108 & 111-113)

Case(s) referred to:

Aberfoyle Plantations Ltd v. Khaw Bian Cheng [1959] CLJU 3; [1959] 1 LNS 3 ***(refd)***

Borneo Housing Mortgage Finance Bhd v. Time Engineering Bhd [1996] 2 CLJ 561 FC ***(refd)***

Borneo Music Conservatory Sdn Bhd v. Malaysian Red Crescent Society [2023] CLJU 1579; [2023] 1 LNS 1579 HC ***(refd)***

Ensui Gudul v. Suin & Ors [2010] CLJU 943; [2010] 1 LNS 943 HC ***(refd)***
Haroon Guriaman v. Nik Mah Nik Mat & Another [1951] CLJU 24; [1951] 1 LNS 24 HC ***(refd)***
KPM Khidmat Sendiran Berhad v. Tey Kim Suie [1994] 3 CLJ 1 SC ***(refd)***
Marappan Muthusamy v. R Sivam Ramasamy [2013] CLJU 1381; [2013] 1 LNS 1381 CA ***(refd)***
Nur Azlin Razal v. Kamunri Naho & Ors [2021] CLJU 681; [2021] 1 LNS 681 HC ***(refd)***
Ong Chat Pang & Anor v. Valliapa Chettiar [1971] CLJU 96; [1971] 1 LNS 96 FC ***(refd)***
PP v. Tan Sri Kasitah Gaddam [2009] CLJU 741; [2009] 1 LNS 741 HC ***(refd)***
Saw Siew Tuan v. Omicrast Manufacturers Sdn Bhd [2013] 9 CLJ 111 CA ***(refd)***
The Chartered Bank v. Yong Chan [1974] CLJU 178; [1974] 1 LNS 178 FC ***(refd)***
Tindok Besar Estate Sdn Bhd v. Tinjar Co [1979] CLJU 119; [1979] 1 LNS 119 FC
Toh Huat Khay v. Lim A Chang [2010] 7 CLJ 261 FC ***(refd)***

Legislation referred to:
Contracts Act 1950, s. 30
Evidence Act 1950, ss. 101, 103
Limitation Ordinance, ss. 9, 11, items 92, 110, 112

For the plaintiff - Lawrence Thien Shin Hing; M/s Chau & Thien
Rodney Yong; M/s Mahap Jelani & Co
For the defendant - Chin Tek Ming & Faustina Tulus; M/s Chin Jingulam & Assocs

Reported by S Barathi

JUDGMENT

Lim Hock Leng J:

The Parties, And Nature Of Dispute

[1] The subject matter in dispute is a parcel of land measuring 114.40 acres held under country lease 065311220 situated at Kampung Nalapak in Ranau, Sabah ("the land").

[2] The core issue is whether the plaintiff, a retired politician from Ranau, had acquired the land from the original registered owner Sahadi bin Dungoi under a sale and purchase agreement dated 30 October 2002 ("the SPA") so as to defeat the defendants' re-reamended counterclaim that the plaintiff had trespassed onto the land by reason of which they sought damages.

[3] The lease for the land had lapsed at the time the SPA was executed.

[4] On 26 March 2004, the said Sahadi passed away. See statement of agreed facts ("SAF"), para. 2.

[5] The nine defendants are the deceased's children.

[6] The defendants had the title deed for the land. It was found in the deceased's drawer. The plaintiff's explanation was that the title deed remained with the deceased who bore the responsibility to renew the lease.

[7] The defendants applied for and obtained a distribution order ("perintah pembahagian tanah") from the Syariah Lower Court dated 14 January 2009.

[8] The lease for the land was renewed by the Director of Lands and Surveys *vide* a letter dated 5 February 2013 for a term of 99 years with effect from January 2012. The first defendant paid the premium amounting to RM57,000 and the registration fee of RM50. See SAF, paras. 3 and 4.

[9] The perintah pembahagian tanah was endorsed on the title deed by the Director of Lands and Surveys on 7 April 2014. See SAF, para. 6.

[10] In 2015, the plaintiff started proceedings in the Syariah High Court which in due course ordered the Syariah Lower Court, in December 2017, to rehear the application for administration and distribution and for the dispute over the ownership of the land to be referred to a civil court.

[11] On 1 October 2020, the plaintiff filed the action herein against the nine defendants.

[12] The plaintiff averred that he had first paid the deceased RM30,000 as "pendahuluan harga jualan tanah CL 065311220 Kg Nalapak Ranau," and then RM60,000 as "part payment of the purchase price of land held under CL 065311220."

[13] He referred to the receipts dated 29 September 1999 and 27 October 1999. See CBOD Part B, vol. 2, pp. 1 and 2.

[14] These receipts were prepared by one Azman Nasir (PW2), a solicitor with Messrs Sia Mojilip & Nasir.

[15] PW2 subsequently prepared the SPA dated 30 October 2002 and a power of attorney ("PA") on the same day. By the PA, the late Sahadi purportedly conferred on the plaintiff wide-ranging powers, including the power to accept letters of offer and to sign for draft titles and issued titles and to pay the premium and registration fee. The PA also empowered the plaintiff to apply to the Director of Lands and Surveys for changes in the terms and conditions, as well as permission for one transfer of the land before fulfilment of the covenants. The PA was provided for consideration in the sum of RM30 and was expressed to be irrevocable. The PA was registered with the Magistrates' Court in Ranau on 1 November 2002.

[16] PW2 then prepared a memorandum of transfer ("MOT") for the land from the deceased to the plaintiff.

[17] PW2 gave evidence that he attested the signatures of the plaintiff and the deceased on the SPA, PA and MOT.

[18] The plaintiff sought declarations and gave evidence that he had purchased the land from the said Sahadi *vide* the SPA which he claimed to be binding on the defendants. He also sought an order for the transfer of the land to the defendants *vide* memorial number MC1404080019 be cancelled forthwith. A

[19] In cases such as this, where there is a dispute as to whether one party has validly purchased the subject property and whether he is entitled to be the registered proprietor, there are a few common factors, by no means exhaustive, that will determine the outcome. Commonly, the court will scrutinise the contemporaneous documents (such as the SPA, receipts, and letters) and test them against the timeline of events. B C

[20] The conduct of the parties can also be telling. Did the "purchaser" lodge a caveat to warn off potential third-party purchasers and to protect his interest? Did he take possession and put it to use? If he did not lodge a caveat or take possession of the land and put it to use, was there a good reason for his conduct? Possession of the title deed can also be a good *indicum* of ownership but it all depends on the facts. D

[21] In the instant case, apart from whether the deceased had agreed to sell the land to the plaintiff, there were other relevant factors, such as the defendants' contention that the subject matter of the purported transaction was non-existent since the lease of the land had lapsed and the land had reverted to the State. The defendants also highlighted the express term in the title deed prohibiting transfer, and argued that limitation had set in so as to defeat the plaintiff's claim. E

[22] The defendants here contend that the receipts, SPA, PA and MOT could not have been executed by the deceased who was the original registered proprietor, since he was illiterate. F

[23] All the witnesses for the defence gave evidence as to the deceased's illiteracy. Amusin bin Karim (DW1) and Keibin bin Amid (DW2), as the second cousins of the deceased, testified that they lived in the same village Kg Mohimboyon when they were young and lived off the land. DW1 did odd jobs for the deceased while DW2 worked for the deceased as a bulldozer operator. DW1 testified that he knew the deceased was illiterate "as he always told me to study and not to be like him who was illiterate." DW2 testified that the deceased "did not have any formal education and he was an illiterate." G H

[24] The first and third defendants who are the deceased's sons, testified that their father was born on 7 October 1933. They also testified that their father never attended school although he had a Class F contractor's licence, ran a sundry shop, and had a couple of shophouses. I

[25] The plaintiff (PW1) testified that it was grossly disrespectful of the deceased's children to describe him as an illiterate. He averred that the late Sahadi, whom he described as a close friend, could read and write. Asmin Nasir (PW2) who prepared the receipts and legal documentation testified that the deceased could read and write in Bahasa Malaysia.

[26] Learned counsel for the plaintiff highlighted the fact that the SPA was stamped on 30 October 2002, while the PA was also stamped on the same day and registered with the Magistrates' Court in Ranau a couple of days later.

[27] Both PW1 and PW2 testified that it was the deceased who engaged PW2 to prepare the legal documentation.

[28] Learned counsel for the plaintiff thus submitted that all the ingredients giving rise to a valid and legally binding agreement were present. He further submitted that since the defendants asserted that the deceased was illiterate and could not have executed they would bear the burden of proof pursuant to ss. 101 and 103 of the Evidence Act 1950.

[29] It was argued that the word "forgery" was not pleaded, that no expert report was obtained to show that the deceased could not have signed the impugned documents, and that no police report was lodged.

[30] I will deal with the pleading point first. While the word "forgery" was not used in the re-amended defence and counterclaim, the defendants denied in para. 2 of their pleading that the deceased had executed the SPA, PA and MOT and in para. 3, they pleaded that "all these documents were not genuine and were not executed by the deceased as the deceased was an illiterate. The defendants aver that the alleged signatures of the deceased were questionable and/or not genuine."

[31] They went on to aver that "the alleged acknowledge of receipt (*sic*) dated 27 October 1999 were not signed by the deceased."

[32] The pleading point raised is thus unmeritorious. The defendants have pleaded in a negative manner that the deceased did not sign the impugned documents, instead of positively asserting that the signatures therein were forged. It is just another way of pleading that the signatures were forged.

[33] As for the plaintiff's argument that no expert report or opinion evidence was adduced to show that the signatures in the impugned documents were forged, the absence of an expert report does not assist the plaintiff since comparables are needed. There was no evidence – apart from the deceased's purported signatures on the documents prepared by PW3 – of any of the deceased's signatures which could be used for comparative analysis by a document examiner, which is consistent with the assertion that the deceased was illiterate.

[34] The plaintiff's argument that there were no police report lodged is circumstantial evidence and it assumes little significance when evaluated alongside the evidence of the plaintiff and PW3, taken together with the contemporaneous documents.

[35] The first receipt shows a sum of RM30,000 had been paid while the second receipt shows that RM60,000 was paid. These receipts show that a total sum of RM90,000 was paid.

[36] The plaintiff's stand was that the purchase price was RM75,000 and the balance of RM15,000 was to pay for the premium for the renewal of the lease. If that be the case, argued the defendants, why was the sum of RM15,000 for the renewal not spelt out in the SPA?

[37] Further, going by the plaintiff's own affidavit when the dispute was first begun by an originating summons, the renewal fee was RM5,000 and not RM15,000. The plaintiff averred in para. 5 of his affidavit affirmed on 13 January 2020: "In fact I have paid RM90,000 which was inclusive of a sum of RM5,000 to pay for the renewal of the lease …" In short, the plaintiff's earlier evidence is contradicted by his pleaded case that the purchase consideration was RM75,000 and the extra sum was for the late Sahadi to pay for the renewal of the lease. See BP, p. 6, amended statement of claim, paras. 8-1.

[38] Furthermore, going by the plaintiff and PW2's oral evidence as well as the receipts, the full purchase price had been paid even before the SPA was drawn up by PW3. Full payment was also pleaded.

[39] However, cl. 1(b) of the SPA – a subsequent document – provides that "the balance of the purchase price of RM45,000 only shall be paid by the purchaser to the vendor by cash or loan from any bank or financial institution upon receipt of a letter from the Director of Lands and Survey to be obtained by the vendor authorising the vendor and the permission to transfer the said property to the purchaser".

[40] Learned counsel for the defendants pertinently questioned: "Why is there a need for the plaintiff as the purchaser to pay the sum of RM45,000 if the purchase price had been paid? Why is this cl. 1(b) … expressly incorporated in the SPA if the purchase price had been paid?"

[41] The material contradiction is compounded by cl. 10 of the SPA which provides:

> If the purchaser shall default in the payment of full purchase price or the balance of the purchase price to clause 1 hereof, then the vendor may terminate this Agreement by giving the purchaser fourteen (14) days notice in writing to that effect whereupon the deposit and all sums paid herein shall be forfeited by the vendor absolutely.

[42] Next, it may be added that PW2 – who claimed to have issued the receipts and prepared the SPA, PA and MOT– also claimed to have "explained to (the deceased) again the contents of these documents in Bahasa Malaysia which he clearly understood." See WSPW2, Q & A 8.

[43] If the purchase price and renewal fee had been paid in full as the plaintiff claimed, there was no reason for cl. 1(b) to state that the plaintiff still had to pay RM45,000 and for cl. 10 to state that if the plaintiff failed to pay the balance, the late Sahadi could terminate the SPA by giving 14 days' notice in writing and forfeit the money already paid.

[44] It is hard to believe that PW2 explained the SPA to the deceased in Bahasa Malaysia and Dusun, and the deceased clearly understood the contents when the contents are inconsistent with the receipts that the deceased purportedly signed.

[45] It is even more unbelievable that the plaintiff signed the SPA which imposed on him an obligation to pay RM45,000 when he says, and the receipts purport to show that full payment has been made!

[46] There is no credible explanation for this material contradiction. One is driven to conclude that the impugned documents are not genuine.

[47] When PW2 was cross-examined as to why he gave evidence that the plaintiff had made full payment of the purchase price of RM90,000 but yet inserted cl. 1(b) requiring the plaintiff to pay a balance of RM45,000, he failed to give a credible explanation. PW2's perplexing answer was: "Again, I said the payment of RM90,000 is already more than the purchase price agreed. The sales and purchase agreement said balance RM45,000 it explains itself because it is already paid. They instructed me to write down the price in total of RM75,000." See NOP, lines 1622 to 1630.

[48] PW2 later tried to explain that the material contradiction boiled down to the parties' instructions "to make it very simple." See NOP, lines 1639 to 1640. The explanation is implausible. To make the SPA simple is not the same as including cls. 1(b) and 10 which contradict the receipts which he had prepared himself.

[49] While the plaintiff and PW2 testified that full payment had been made, the plaintiff also tried to explain that there was a need to pay a balance because "the purchase price was also included in the payment of premium when the lease is renewed" (NOP, lines 760 to 764) even though the late Sahadi had supposedly been paid RM5,000 or RM15,000 for the renewal premium.

[50] Notably, when we look at both receipts and the SPA prepared by PW2, the conveyancing solicitor, they were issued solely for the purchase of the land and there is no mention as to who is to bear the costs of renewing the expired lease or the amount payable.

[51] In this regard, it is pertinent to note that in *Marappan Muthusamy v. R Sivam Ramasamy* [2013] CLJU 1381; [2013] 1 LNS 1381; [2014] 4 MLJ 428, the Court of Appeal held:

> We agree with the submission of learned counsel for the appellant that had the learned JC took into account these unexplained discrepancies and irregularities she would not have concluded that these exhs are genuine and are the true representations of the transaction between parties.

[52] The plaintiff's denial/explanation defies belief. The plaintiff cannot blow hot and cold.

[53] Further, on 14 February 2014, Messrs Sia Mojilip & Nasir, acting on the instructions of the plaintiff, wrote to the second defendant "sebagai pewaris" to invite him to their law office to discuss, among others, "bayaran baki harga beli kepada pihak penjual/pewaris." As the words tell us, the payment was to be for the balance purchase price, not for the renewal premium.

[54] Any privilege that may attach to that letter which was marked "tanpa prejudis" was waived as there was no objection when the plaintiff was cross-examined on it. See CBOD Part A, p. 27.

[55] A defence raised was that "the plaintiff has not paid for the full purchase price." See BP, p. 15, para. 8. Nonetheless, they abandoned that line of defence in submissions.

[56] Even so, the plaintiff bears the burden of proving that he has a valid and binding SPA by virtue of having paid the full purchase price as pleaded.

[57] Moreover, the inconsistencies in the evidence regarding the purchase price and whether it was actually paid in full and what was the amount to be paid for the renewal of the lease cast doubts over whether the receipts, SPA, PA and MOT are genuine and whether they had been signed by the deceased.

[58] From the defence testimony, the court would accept that the deceased never went to school. He was born in 1933, at a time when schooling was not compulsory and World War II broke out when he was still a child. There was no evidence he ever signed any documents.

[59] It is noted that the first receipt was in Bahasa Malaysia. While the deceased may have understood Bahasa Malaysia, he certainly did not understand English, the language in which the second receipt and the SPA, PA and MOT were prepared. The plaintiff himself testified: "He doesn't understand English. He can't write in English." See NOP, line 624.

[60] It seems peculiar that PW2 who also knew the deceased for a long time (since the 1980s) had prepared the first receipt in Bahasa Malaysia but prepared the second receipt and other impugned documents in English.

[61] The court is of the view that it is more likely than not that the deceased did not sign the impugned documents although there is little doubt that the documents came into existence on or around the date they were prepared or signed by the plaintiff/attested by PW2, since the SPA and PA were stamped and the PA registered shortly thereafter.

[62] The court expresses scepticism that the deceased signed the impugned documents because when the contents are tested against the timeline of events, they do not stand up to scrutiny for the reasons given earlier.

[63] In the process of deciding the pivotal issue, the court drew guidance from what Chang Min Tat FJ had to say in *Tindok Besar Estate Sdn Bhd v. Tinjar Co* [1979] CLJU 119; [1979] 1 LNS 119; [1979] 2 MLJ 229:

> For myself, I would with respect feel somewhat safer to refer to and rely on the acts and deeds of a witness which are contemporaneous with the event and to draw the reasonable inferences from them than to believe his subsequent recollection or version of it, particularly if he is a witness with a purpose of his own to serve and if it did not account for the statements in his documents and writings. *Judicial reception of evidence requires that the oral evidence be critically tested against the whole of the other evidence and the circumstances of the case.* Plausibility should never be mistaken for veracity. (emphasis added)

[64] There are other strands of evidence which cast doubt on the genuineness of the documents in question.

[65] Clause 3 of the SPA stipulates: "On the signing of this agreement, the vendor shall execute and deliver a valid and registrable memorandum of transfer to the purchaser which shall be presented for registration with the Central Land Registry, Kota Kinabalu **upon purchaser paying the full purchase price for the said property"** (emphasis added).

[66] If at all the full purchase price had been paid as asserted by the plaintiff, a MOT would have been executed at the same time as the SPA on 30 October 2002.

[67] Instead, the MOT was only purportedly signed by the deceased on 29 January 2003, suggesting that full payment was made then. However, full payment could not have been made because, as mentioned earlier, the plaintiff through his solicitors broached the topic of payment of the balance of the purchase price in 14 February 2014.

[68] Clause 6 of the SPA stipulates: "The purchaser shall be entitled to lodge a caveat on the said property at any time against the said property immediately after the signing of this agreement to prohibit the vendor from selling or howsoever deal with the said property in contravention of the provision herein."

[69] Yet the plaintiff "claiming an interest" in the land only lodged his first caveat based on 29 June 2012, about ten years later.

[70] It may be noted that the plaintiff signed the caveat on 17 October 2011 but only lodged it some eight months later. See CBOD Part A, p. 25. It would seem that he did not want the defendants to get wind of it or his claim on the land until they started their eviction attempts in 2012.

[71] In WSPW1, the plaintiff sought to explain the delay on account of his court case which ran from 2003 to 2009 and he only started planting oil palm trees in 2011 on the land. While there is no doubt that the plaintiff had to undergo a trial where he was acquitted at the end of the prosecution's case (see *PP v. Tan Sri Kasitah Gaddam* [2009] CLJU 741; [2009] 1 LNS 741; [2009] 6 MLJ 494), the SPA allowed him to lodge a caveat right away in 2002.

[72] He did not do so, although he claimed that PW2 had informed him that "it is better to put this verbal agreement into record to secure my rights on the land." See WSPW1, Q & A 5.

[73] The plaintiff's attempt to downplay the importance of a caveat is thus not credible.

[74] In *Ong Chat Pang & Anor v. Valliapa Chettiar* [1971] CLJU 96; [1971] 1 MLJ 224, the Federal Court stressed the importance of lodging a caveat by explaining that "a purchaser has a caveatable interest, and he can forbid, by registering a caveat, the subsequent registration of any transfer, charge or lease, until the caveat is removed."

[75] In *Haroon Guriaman v. Nik Mah Nik Mat & Another* [1951] CLJU 24; [1951] 1 LNS 24; [1951] 1 MLJ 209, Briggs J held:

> I think that where a purchaser under an agreement for sale of land does not impose a caveat to protect his interests, does not obtain possession of an issue copy document of title, and does not take physical possession of the land, he is guilty of gross negligence and his equity should be postponed to the equity of a later purchaser of the same land who has taken any one of those steps.

[76] These are steps that a purchaser should take, whether or not the case involves a third-party purchaser for value who asserts he takes them without notice.

[77] If he does not do so when the transaction documents allow him to do so, and authenticity is in issue, the court may look at the documents askance. More so in this case where the plaintiff-purchaser says he was advised by PW2 to enter into the SPA to secure his rights.

[78] Moreover, the purported PA gave the plaintiff the right to accept letters of offer and to sign for the draft title and issued title, and to pay the premium. The late Sahadi passed away on 26 March 2004. If at all the late Sahadi had signed the PA, there is no reason why the plaintiff did not invoke

A the PA to move along the renewal process. He certainly did not ask the defendants to do so, if at all the SPA – which is binding on successors in title – is genuine. The PA did not come to an end when the late Sahadi passed away. It was expressed to be irrevocable and for valuable consideration, and it was coupled with a proprietary interest, unlike a pure agency which
B terminates upon the death of the agent. See *Nur Azlin Razal v. Kamunri Naho & Ors* [2021] CLJU 681; [2021] 1 LNS 681.

Occupation Of The Land/Lodgment Of Caveat/Delay

[79] I now turn to consider the evidence on who occupied the land, a factor
C that can be indicative of whether a claimant has acquired or retained rights over it.

[80] Both sides claimed to have occupied the land.

[81] The plaintiff testified that he started to develop the land as an oil palm plantation in 2011 when there was an increase in oil palm prices and after
D his court case had ended in 2009. At that time, the land was a forest and there were no signs of cattle farming. He elaborated that there was only a small part of the land with neglected oil palm trees planted by the late Sahadi. He adduced evidence of the purchase of seedlings and other expenses such as machinery.

E **[82]** For the defendants, DW3 testified that he managed the land after his father passed away and was assisted by DW2, his brother. DW3 said he officially took over the management of the land after the distribution order was granted by the Syariah Lower Court (2009). DW3 said he had been planting oil palm and durian trees progressively since his father's death.
F Whatever DW3 may have meant by his testimony on the management of the land and his progressive planting since the death of his father (2004) DW3's cultivation on the land is unlikely to have started before 2017.

[83] Firstly, although DW3 referred to CBOD Part B, vol. 2, pp. 186 to 195, as proof of the expenses which the defendants allegedly incurred to
G develop the land from 1971 to 2016, these are all summaries of accounts. No source documents were provided. These summaries carry no weight. As was held by Dzaiddin SCJ (as His Lordship then was) in *KPM Khidmat Sendiran Berhad v. Tey Kim Suie* [1994] 3 CLJ 1:

H > … the summary of accounts does not prove the facts and particulars stated therein. The mere fact that the summary of the particulars were made could never be taken as proving that the contents were correct. It has to be proved by calling the maker to explain the facts and the basis of the calculation of the amount claimed.

I **[84]** Secondly, the first defendant (DW4) says that his brothers, the second and third defendants, started evicting the plaintiff's workers from the land and "finally the plaintiff's workers vacated the land around the year 2017." It would have been unlikely for the defendants to occupy and cultivate the land while the plaintiff's workers were still there.

[85] Thirdly, the staff salary vouchers *vide* WSDW3, paras. 11 to 13, were from 2017 onwards. The bill for the purchase of belian timber and barbed wire is dated 14 March 2017. Also, the bills by one Masinin Salim for the sums of RM110,000 for works said to have been carried out on the land, and by one Salim Johan for a total sum of RM95,000 for clearing the land and building workers' quarters thereon. There were other bills but they were either issued in 2017 or thereafter.

[86] Masinin and Salim were not called as witnesses, and their bills have no or little probative value.

[87] That said, DW3 did refer to photographs of the storage area for fertiliser, workshop and the workers' rest station which were not challenged but the dates on which they were constructed are unknown. See CBOD Part B vol. 2, pp. 548 to 555.

[88] Hence, it is more likely that DW3 and DW2 only started cultivating the land in 2017 although they may have been involved in relation to the land earlier by managing the finances such as quit rent, and payment for the renewal of the lease in 2013.

[89] While the plaintiff had occupied and put the land to use ahead of the defendants at much expense, it is significant that he did not timeously lodge a caveat or take legal action against them when they wrested occupation of the land such as applying for the necessary interim injunctive relief. In other words, the plaintiff's earlier occupation of the land is not determinative of his claim that he had purchased the land.

Lease Had Expired At The Time Of The Alleged Sale

[90] A perusal of the title deed shows that it had expired on 31 December 1991. It was only renewed on 1 January 2012. The late Sahadi passed away on 26 March 2004.

[91] The defendants thus argue that the land or title had reverted to the State whereby the deceased had no transferable interests or title in the land. See *Ensui Gudul v. Suin & Ors* [2010] CLJU 943; [2010] 1 LNS 943. The deceased, it was argued, could not pass what he did not have.

[92] The defendants relied on *Saw Siew Tuan v. Omicrast Manufacturers Sdn Bhd* [2013] 9 CLJ 111; [2013] 6 MLJ 189. In that case, the appellant's late husband held a lease over the subject land which had expired in 1982. The appellant's late husband died in 1990. The appellant then sold the land to the respondent in 1995.

[93] The respondent helped the appellant to apply for a lease of the property. The application for a lease was successful. A new lease was issued to the appellant in 2004.

[94] When the appellant refused to apply to the State Authority to transfer the land, the respondent sued for specific performance. The appellant gave evidence she intended to sell the land though she had no title. The High Court held that there was a valid contract although both parties were aware that the appellant had no right over the land, because the State authority did not take back the land and the appellant's late husband, as the previous leaseholder, had an indirect interest over the property.

[95] On appeal, the decision at first instance was reversed. The Court of Appeal held that at the material time, the appellant did not have good title over the land. As the agreement did not provide any deadline or time frame to obtain the new lease and there was no certainty that the applicant's application for a new lease would be approved, the agreement was void for uncertainty by virtue of s. 30 of the Contracts Act 1950.

[96] In so holding, the Court of Appeal found the advice of the Privy Council in *Aberfoyle Plantations Ltd v. Khaw Bian Cheng* [1959] CLJU 3; [1959] 1 LNS 3 [1960] 1 MLJ 47 instructive. There the subject matter of sale in 1955 was a rubber estate of 1,336 acres more or less. That included some 182 acres in respect of which the leases had expired in 1950. The Privy Council was of the view that "unless and until new leases were granted the vendor had no assignable interest in the 182 odd acres."

[97] Nonetheless, the defendants' contention that (a) there was nothing to assign and (b) the SPA was void for uncertainty (on the basis that there was no time frame for the renewal to be obtained) was not pleaded, even though the plaintiff himself had applied for the land. By applying for the land after allegedly buying it, the plaintiff clearly knew that the lease had expired.

[98] Yet the defendants did not bring up these points in their pleaded case. Had they done so, the plaintiff would have had the opportunity to rebut the contention by adducing evidence, say, that there was a time frame for obtaining the renewal or there was a collateral conditional agreement, and so on. In *The Chartered Bank v. Yong Chan* [1974] CLJU 178; [1974] 1 LNS 178; [1974] 1 MLJ 157, the Federal Court held that a point which is not pleaded should not be raised or considered since the function of pleadings is to give notice so that the opposing party may direct his evidence to the issue disclosed by them.

[99] Importantly, when learned counsel for the plaintiff objected to such evidence being adduced at trial, the defence relented and moved on. See NOP, Q & A 946.

[100] Taking the defendants' omission in their pleading and the abandonment of their contention during the trial, together with the subsequent renewal of the lease, the defendants' two-fold contention does not avail them.

Prohibition Against Transfer

[101] Be that as it may, the title deed has an express term that transfer is prohibited and the point is expressly pleaded in the re-reamended defence and counterclaim. The plaintiff attempted to draw the sting out of the defence of illegality based on the express prohibition against transfer by submitting that a distinction should be drawn between a condition precedent and an obligation which was part of the sale and purchase agreement.

[102] There is no merit in the plaintiff's argument. The defence is not that the transfer from the deceased to the plaintiff would be a breach of a condition precedent, but that a transfer is expressly prohibited and would be invalid and unlawful.

[103] Learned counsel for the defendants cited *Borneo Music Conservatory Sdn Bhd v. Malaysian Red Crescent Society* [2023] CLJU 1579; [2023] 1 LNS 1579 where the litigants had entered into a management agreement in respect of a building on a parcel of land which title deed required the prior consent of the Director of Lands and Surveys for the defendant to enter into a sublease. The requisite consent for the sublease was not obtained. The so-called management agreement was stamped as a tenancy agreement. Justice Leonard Shim had no hesitation in holding that the management agreement was used "to disguise the true purpose of the agreement which is to rent and/or sublease the demised premises" and that was "in breach of the express condition of land title." In the upshot, the so-called management agreement was found to be unenforceable as it was tainted by illegality and "prohibited under s. 26(a), (b) and (e) of the Contracts Act 1950."

[104] Reference was also made to *Toh Huat Khay v. Lim A Chang* [2010] 7 CLJ 261; [2010] 4 MLJ 312. In that case, the title deed stated that the subject land could not be transferred within a period of ten years from the date of registration of the title and that after the period of ten years, the land could only be transferred with the consent of the state authority. Nonetheless, the Director of Lands and Mines purported to approve the transfer of the land to the defendant before the ten years had passed by. The Federal Court held:

> (1) The said land, due to the said restriction in interest endorsed on the document of title pursuant to s. 124(1)(b) of the NLC, could not be transferred by TKC to the defendant unless TKC as the proprietor had, prior to the transfer, applied to the state authority for the striking off or the rescission of the said restriction in interest. The defendant had not shown that such an application was made by TKC.
>
> (3) The transfer of the said land by TKC to the defendant was clearly in breach of the provisions of the NLC. The document of title had yet to be cleansed of the said restriction in interest and without the title being freed of such restriction in interest, the transfer of

ownership was incapable of registration. That being the position, the registration of transfer of ownership to the defendant was not indefeasible since the registration thereof had been obtained by means of an insufficient or void instrument pursuant to s. 340(2)(b) of the NLC.

[105] As such, there is merit in the defence in the instant case that any transfer is expressly prohibited and would be illegal, more so when there is no evidence that there was any application to the Director of Lands and Surveys for transfer of the land.

Limitation

[106] If at all the plaintiff may be taken to have acquired the land from the late Sahadi, his action is also defeated by the plea of limitation invoked by the defendants.

[107] Time started to run from 2012 when DW3 went to the land to try to wrest occupation of the land from the plaintiff and his workers, and the plaintiff lodged his first caveat on 29 June 2012 some ten years after the purported SPA. The timing of the first caveat and DW3's act of staking his claim suggests that the plaintiff would have known at that point in time that his proprietary rights over the land pursuant to the SPA were breached and challenged.

[108] Alternatively, time started to run from 14 February 2014 when the plaintiff's solicitors wrote to the second defendant to discuss the payment of the purchase price, the handing over of the title deed, and "tindakan bersama untuk kebaikan semua pihak." The label "tanpa prejudis" of this Part A document further indicates that there was already a dispute relating to the land.

[109] To recapitulate, the plaintiff's action herein was filed on 1 October 2020.

[110] The plaintiff sued for declarations/orders to uphold the SPA while prayer (d) is for an order that "the registration of the transfer of the said land to the defendants … be cancelled forthwith."

[111] The limitation period for specific performance of a contract is three years from the date fixed for performance or, if no such date is fixed, when the plaintiff first had notice that performance is refused. See the Limitation Ordinance, item 92 of the Schedule.

[112] The limitation period for a suit for which no limitation period is provided elsewhere in the Schedule to the Limitation Ordinance is six years. In such an instance, time starts to run when the right to sue accrues.

[113] On either view, the plaintiff's claim, which was filed on 1 October 2020, is defeated by the plea of limitation mounted by the defendants.

[114] The plaintiff would have been aware that the longest limitation period it could have the benefit of would be six years from the date of his letter dated 14 February 2014, *viz*, 14 February 2020. In computing the period of limitation, the day from which such period is to be reckoned is to be excluded. See Limitation Ordinance, s. 11.

[115] While the plaintiff had filed an originating summons on 2 February 2020, it was withdrawn on 15 June 2020. It was not converted to a writ action.

[116] Section 9 of the Limitation Ordinance is of no help to the plaintiff. It only applies when full payment has been made. Section 9 provides:

> Notwithstanding anything hereinbefore contained no suit against a person in whom property has become vested in trust for a specific purpose, or against his legal representatives or assigns, not being assigns for valuable consideration, for the purpose of the following in his or their hands such property, shall be barred by any length of time.

[117] The plaintiff cannot be said to be a bare trustee, even if the SPA were to be treated as having been signed by the late Sahadi, as full payment of the purchase price had not been made. As mentioned earlier, the plaintiff through his solicitors, Messrs Sia Mojilip & Nasir, wrote to the second defendant "sebagai pewaris" on 14 February 2014 to invite him to their law office to discuss, among others, "bayaran baki harga beli kepada pihak penjual/pewaris."

[118] It is thus clear that the plaintiff himself took the position as late as 2014 that full payment had not been made.

[119] In *Borneo Housing Mortgage Finance Bhd v. Time Engineering Bhd* [1996] 2 CLJ 561; [1996] 2 MLJ 12, Edgar Joseph Jr FCJ, in delivering the judgment of the Federal Court, held:

> In our view, the contractual events which result in the vendor becoming a bare trustee of the land, the subject matter of the agreement of sale and purchase, for the purchaser, is on completion, **that is to say, upon receipt by the vendor of the full purchase price,** timeously paid and when the vendor has given the purchaser a duly executed, valid and registrable transfer of the land in due form in favour of the purchaser, for it is then that the vendor divests himself of his interest in the land.
>
> In our view, it is not a correct description of the relationship between the parties to a contract of sale and purchase of land to say, as did the High Court at Shah Alam in Ahmad bin Salleh, that from the time a contract of sale and purchase of land is concluded, the vendor is a trustee for the purchaser. At that stage, they are only parties to a contract of sale and purchase of which a court may, in certain circumstances, decree specific performance. (emphasis added)

[120] On the plaintiff's own evidence and the law, the plaintiff cannot be regarded as a trustee who is immunised against the defence of limitation.

[121] The 12-year period under items 110 and 112 of the Schedule to the Limitation Ordinance does not avail the plaintiff as it relates to actions for possession, whereas in the present action, the reliefs sought *vide* prayers (a), (b) and (c) are for declarations/orders to uphold the SPA while prayer (d) is for an order that "the registration of the transfer of the said land to the defendants … be cancelled forthwith."

[122] The cause of action in the case at hand is grounded on breach of contract, not recovery of possession or trespass.

[123] There is yet another point raised by the plaintiff to argue that his claim is within the limitation period. He contended that the period from 16 February 2015 (when he started proceedings in the Syariah High Court to set aside the Distribution Order) to December 2017 (when the Syariah Lower Court was ordered to rehear the defendants' application for administration and distribution) ought to be taken out in computing the limitation period.

[124] The plaintiff relied on s. 14 of the Limitation Ordinance. It states:

> In computing the period of limitation prescribed for any suit, the time during which the plaintiff has been prosecuting with due diligence another civil proceeding, whether in a court of first instance or in an appellate court, against the defendant shall be excluded **where the proceeding is founded upon the same cause of action** and is prosecuted in good faith in a court which, from defect of jurisdiction or other cause of a like nature, is unable to entertain it. (emphasis added)

[125] The plaintiff's contention is unmeritorious. His action in the Syariah High Court was not founded on the same cause of action.

[126] In addition, ownership disputes founded on a contractual cause of action have to be adjudicated or determined in a civil court, and that is where the plaintiff ought to have commenced proceedings in good time.

Conclusion

[127] There are ancillary issues raised by the defendants but they are not determinative of the core issue of whether the plaintiff had purchased the land from the late Sahadi. Suffice to say that the contemporaneous documents are inconsistent with and contradict the plaintiff's pleaded claim that he had fully paid the purchase price, which leads the court to conclude, taken together with the testimony of the defence witnesses, that the late Sahadi was illiterate and could not have signed the impugned documents that contained inconsistencies and contradictions which were not credibly explained.

[128] The defendants' argument that their late father could not have sold the land for RM90,000 (inclusive of the premium for renewal which may not have been ascertainable at the time of the alleged transaction) when the land was valued at RM2,060,000 deserves little, if any, weight. The valuation report makes it clear that the material date of valuation is 30 December 2014. There is no evidence as to the value of the land in September/October 1999.

[129] Next, the plaintiff's earlier occupation of the land is neutralised by his inertia in lodging caveats on the land or initiating action to regain occupation after he was sent packing. The custody of the title deed was with the defendants who gave evidence that their late father never told them he had sold the land. As against that, the plaintiff's explanation was that the title deed remained with the late Sahadi so he could attend to the renewal of the lease.

[130] These are factors that are not determinative of the core issue.

[131] In any event, the title deed had an express term prohibiting transfer. The plaintiff's claim is also vanquished by the defendants' plea of limitation.

[132] The defendants' counterclaim premised on trespass is allowed but with nominal damages of RM10,000. Although liability was established, there was no evidential basis to award a specific measure of loss. The nominal damages are to carry interest, as prayed, of 5% per annum from the date of judgment.

[133] The plaintiff is to pay the defendants RM30,000 costs in total subject to payment of the allocatur fee.